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6 IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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ALBERT JOHN FREEMAN,

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Plaintiff,

No. C 13-04179 JSW

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v.

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DELTA AIR LINES, INC.,

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Defendant.

**ORDER RE TENTATIVE  
RULINGS AND QUESTIONS RE  
MARKMAN HEARING**

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE  
NOTICE OF THE FOLLOWING TENTATIVE RULING AND QUESTIONS FOR THE  
HEARING SCHEDULED ON JUNE 12, 2015, AT 9:00 a.m.:

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The Court has reviewed the parties' briefs and, thus, does not wish to hear the parties  
reargue matters addressed in those pleadings. If the parties intend to rely on legal authorities  
not cited in their briefs, they are ORDERED to notify the Court and opposing counsel of these  
authorities reasonably in advance of the hearing and to make copies available at the hearing. If  
the parties submit such additional authorities, they are ORDERED to submit the citations to the  
authorities only, without argument or additional briefing. *Cf.* N.D. Civil Local Rule 7-3(d).

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The parties will be given the opportunity at oral argument to explain their reliance on such  
authority. The Court suggests that associates or of counsel attorneys who are working on this  
case be permitted to address some or all of the Court's questions contained herein.

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The parties shall each have 60 minutes to present their respective arguments on claim  
construction. The Court provides its tentative constructions of the disputed terms.

1           **1.       “Recording point of sale information”**

2           The term “recording point of sale information” appears in Claim 26 of the ’284 Patent.

3           Freeman argues that the term “recording point of sale information” must be construed to  
4           mean “recording sale’s information that was originated at a point where a customer makes  
5           payment to a merchant in exchange for goods and services.” (Parties’ Second Joint Claim  
6           Construction and Prehearing Statement at 2.) Delta, on the other hand, argues that the term  
7           must be construed to mean “automatic collection and storage of information regarding the  
8           product related to the time and place that the product is paid for.” (*Id.*)

9           The key dispute between the parties is whether the reference to “point-of-sale  
10          information” in the specifications should bear on the definition of the disputed term. The  
11          specification make particular reference to “point-of-sale information” and states that it might  
12          include “date and time of sale, costs, forms of payment, and zip codes of store.” (’284 Patent at  
13          5:52-54.) The specification further sets out that the mechanism described by the patent causes  
14          the “automatic collection and storage of point-of-sale information regarding product.” (*Id.* at  
15          5:50-52.) The intrinsic evidence supports Delta’s proposed construction and Freeman’s  
16          proposal is too vague to be helpful and fails to account for the automatic collection of the  
17          information at the point in time of the sale of a product.

18           The Court **tentatively** adopts the following construction: “automatic collection and  
19          storage of information regarding the product related to the time and place that the product is  
20          paid for.”

21           **2.       “Trigger figurecode”**

22           The term “trigger figurecode” appears in Claims 23, 26, 29 and 31 of the ’284 Patent.

23           Freeman argues that the term “trigger figurecode” must be construed to mean “2-  
24          dimensional visually discernable nonalphanumeric graphic that is used in the manner recited by  
25          the claim in which the term is used.” (Parties’ Second Joint Claim Construction and Prehearing  
26          Statement at 3.) Delta, on the other hand, argues that the term must be construed to mean “a  
27          figurecode that contains instructions to a computer to take a specific action.” (*Id.*)

1           The proposed construction offered by Freeman does not advance the jury's  
2 understanding of the term as the proposal merely states that it is used in the manner recited in  
3 the claim. The intrinsic evidence also defines the preferred embodiment to have "triggercode"  
4 that is "graphical and substantially nonalphanumeric." ('284 Patent at 3:49-51.) First, the  
5 definition of the term cannot disclaim alphanumeric symbols by virtue of the description of the  
6 preferred embodiment. Second, the description states that it is "*substantially*  
7 nonalphanumeric," indicating that it the patent envisioned more than wholly nonalphanumeric  
8 figurecode. Further, there is no support for adopting the description of the "2-dimensional,  
9 visually discernable graphic trigger figurecode" language from the dependent claim 32.

10           The Court **tentatively** adopts the following construction: "a figurecode that contains  
11 instructions to a computer to take a specific action."

12           **3.        "Incorporated into"**

13           The term "incorporated into" appears in Claims 21 and 23 of the '284 Patent.

14           Freeman argues that the term "incorporated into" must be construed to mean "to include  
15 (something) as part of something" or "united into one body." (Parties' Second Joint Claim  
16 Construction and Prehearing Statement at 3.) Delta, on the other hand, argues that the term  
17 must be construed to mean "occupies same space as." (*Id.*)

18           It appears that the key dispute is whether the Court should rely on dictionary definitions  
19 of the term "incorporate" or rely on the explication of the term in the intrinsic evidence. The  
20 specifications distinguish between being incorporated into the letters of the trademark itself,  
21 figurecodes which "could be formed around the trademark, but still in the [same region]." ('284  
22 Patent at 5:44-49.) The distinction between something formed around a trademark is manifestly  
23 not incorporated into the trademark. Incorporated into must signify something closer than near  
24 or around. Therefore, the Court tentatively adopts Delta's proposal.

25           The Court **tentatively** adopts the following construction: "occupies same space as."

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1           **4. “Providing information-gathering instruction to the computer system”**

2           The term “providing information-gathering instruction to the computer system” appears  
3 in Claim 23 of the ’284 Patent.

4           Freeman argues that the term “providing information-gathering instruction to the  
5 computer system” must be construed to mean “prompting the computer system to automatically  
6 collect additional information.” (*Id.* at 4.) Delta, on the other hand, argues that the term must  
7 be construed to mean “including in the triggercode instructions that command the system to  
8 record information.” (*Id.*)

9           It appears that the key dispute is whether the Court may rely on the dictionary definition  
10 of “collect” which is not part of the term to be construed. Further, there is no support for the  
11 proposition that the triggercode prompts the computer to collect *additional* information. It is  
12 unclear from Freeman’s proposal what the information would be in addition to. The Court  
13 cannot ignore the mention of “instruction” in the disputed term.

14           The Court **tentatively** adopts the following construction: “including in the triggercode  
15 instructions that command the system to record information.”

16           **5. “Start search location in the computer system of a plurality of start-search  
17           locations in the computer system to aid the search”**

18           The term “start search location in the computer system of a plurality of start-search  
19           locations in the computer system to aid the search” appears in Claim 31 of the ’284 Patent.

20           Freeman argues that the term “start search location in the computer system of a plurality  
21           of start-search locations in the computer system to aid the search” must be construed to mean “a  
22           location in the computer systems which, if searched first, results in a faster search than if the  
23           location had not been searched first.” (*Id.*) Delta, on the other hand, argues that the term must  
24           be construed to mean “a specific block of memory out of multiple specific blocks of memory.”  
25           (*Id.*)

26           In context, the object of this element is to aid the search “for the stored electronic  
27           version of the graphic figurecode” in order to save search time. (’284 Patent at 8:31-34.) But,  
28           Delta’s proposed construction requires that the position of the start search location be a specific  
block of memory. The Court finds lack of support for this restriction on the construction of the

1 term. Rather, as Freeman proposes, the location must be a place that, if searched first, results in  
2 a faster search than had it not been searched first.

3 The Court **tentatively** adopts the following construction: “a location in the computer  
4 systems which, if searched first, results in a faster search than if the location had not been  
5 searched first.”

6 **6. “Product identifier”**

7 The term “product identifier” appears in Claims 21 and 23 of the ’284 Patent.

8 Freeman argues that the term “product identifier” must be construed to mean “product  
9 identifier region.” (*Id.* at 4.) Delta, on the other hand, argues that the term must be construed to  
10 mean “the name of the product or an indicia of source.” (*Id.*)

11 Freeman argues that if this term is not defined to indicate the region of the product  
12 identifier, the claim would be invalid, thus requiring the Court to assume that to the extent the  
13 term is unclear or indefinite, it should be resolved to indicate the region around the product  
14 identifier. This argument is not persuasive. Merely defining the product identifier as a product  
15 identifier region misses the distinction between the two terms. The drawing (figure 4) in the  
16 patent has an arrow which points to the product identifier region and the specification  
17 distinguishes this broader area with a reference to “the trademark itself.” (’284 Patent at 5:32-  
18 35.)

19 The Court **tentatively** adopts the following construction: “the name of the product or an  
20 indicia of source.”

21 **7. “Product identifier region”**

22 The term “product identifier region” appears in Claims 21 and 26 of the ’284 Patent.

23 Freeman argues that the term “product identifier region” must be construed to mean  
24 “region where the product is identified.” (*Id.* at 5.) Delta, on the other hand, argues that the  
25 term must be construed to mean “area in or around the product identifier and closer than other  
26 graphic or alphanumeric writing on the product.” (*Id.*)

27 It is not clear that Freeman’s proposed construction would aid the jury as it is, for the  
28 most part, tautological. Delta argues that in order to distinguish itself from prior art (McNair

1 patent), the patent at issue had to distinguish relative proximity of the region surrounding the  
2 product identifier. It is not clear, however, why the Court should adopt Delta's proposal that  
3 the area must be closer to the product identifier than to other graphic or alphanumeric writing  
4 on the product.

5 The Court **tentatively** adopts the following construction: "area in or around *and closely*  
6 *proximate to* the product identifier."

7 The last three terms are related and should be construed in tandem.

8 **8. "Graphic figurecode"**

9 The term "graphic figurecode" appears in Claims 31 of the '284 Patent.

10 Freeman argues that the term "graphic figurecode" must be construed to mean "graphic  
11 form, such as a bar code." (*Id.*) Delta, on the other hand, argues that the term must be  
12 construed to mean "a visually discernable object containing encoded information associated  
13 with an individual." (*Id.*)

14 **9. "Graphic product I.D. figurecode"**

15 The term "graphic product I.D. figurecode" appears in Claim 21 of the '284  
16 Patent.

17 Freeman argues that the term "graphic product ID figurecode" must be construed to  
18 mean "graphic form, such as a bar code, identifying the chosen product." (*Id.*) Delta, on the  
19 other hand, argues that the term must be construed to mean "a visually discernable object  
20 containing encoded information associated with a retail product." (*Id.*)

21 **10. "Graphic I.D. figurecode"**

22 The term "graphic I.D. figurecode" appears in Claim 26 of the '284 Patent.

23 Freeman argues that the term "graphic I.D. figurecode" must be construed to mean  
24 "graphic form, such as a bar code, identifying the chosen product." (*Id.* at 6.) Delta, on the  
25 other hand, argues that the term must be construed to mean "a visually discernable object  
26 containing encoded information associated with an item." (*Id.*)

27 Freeman basically contends that each of these terms should be construed to mean nearly  
28 the same thing. However, different elements in the claim must recite different structures.

1 However, the Court finds that portions of Freeman's proposed constructions conform to the  
2 patent's specifications and definitions.

3 The Court **tentatively** adopts the following constructions:

4 For graphic figurecode: "graphic form, such as a bar code, containing encoded  
5 information."

6 For graphic I.D. product figurecode: "graphic form, such as a bar code, containing encoded  
7 information associated with a retail product."

8 For graphic I.D. figurecode: "graphic form, such as a bar code, containing encoded  
9 information associated with a retail product."

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Further questions for the parties to address:

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(1) Does Delta contend that the patent as drafted fails for obviousness or challenge  
the validity of the patent for any other reason?

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(2) Have the parties considered further mediation of their dispute?

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**IT IS SO ORDERED.**

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Dated: June 5, 2015

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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE

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